

APPEAL NO. 010508

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 6, 2001. The hearing officer resolved the issue by determining that the appellant/cross-respondent's (claimant) spinal stenosis was aggravated by the compensable injury he sustained on _____. The claimant appeals and argues that the hearing officer neglected to add to the disputed issue whether the claimant's spinal radiculopathy was aggravated by his compensable injury. The claimant requests that the case be remanded or reformed to reflect the addition of spinal radiculopathy to the issue. The respondent/cross-appellant (carrier) appeals on sufficiency grounds and requests that the decision and order be reversed and rendered in favor of the carrier. The claimant responds and asks that the Appeals Panel affirm the hearing officer, except with respect to his appeal requesting the addition of spinal radiculopathy to the issue.

DECISION

Affirmed in part and remanded in part.

The hearing officer did not err in concluding that the claimant's lumbar spinal stenosis was aggravated by the compensable injury on _____. The claimant, a seventy-three-year-old man, testified that while working on _____, he fell to the floor when his chair collapsed beneath him. He testified that the next day, he really began hurting in his lower back and within days went to an emergency room for treatment. Approximately a week after his injury, the claimant saw his family physician, Dr. B, who initially diagnosed a back strain. However, according to the claimant's testimony, upon receipt of the reports of further diagnostic tests, Dr. B sent the claimant to a specialist and, ultimately, the claimant underwent spinal surgery for his injuries. The claimant further testified that while he previously had spinal surgery and back problems in 1965, he had since then had no real problems until after the date of his fall. The claimant said that he felt fine until the fall but afterwards could barely move. He also said that no doctor, since 1965, recommended surgery for his back until after his fall on _____.

The medical records also seem to support the hearing officer's determination. The February 17, 2000, report of Dr. T states that the fall was the cause of the injuries suffered by the claimant. In an undated set of questions to and responses from Dr. B, he says that the claimant's spinal stenosis was aggravated by his fall at work, because he had not had any problems before the injury. In that same set of questions and answers, Dr. B maintains that the claimant's lumbar radiculopathy was also aggravated by his fall at work, for the same reason the spinal stenosis was aggravated. In his report dated November 20, 2000, Dr. H states that the claimant's current "spinal injury" was caused by the fall. The carrier also introduced medical evidence, purporting to show that the claimant's spinal stenosis and lumbar radiculopathy were preexisting conditions in a degenerative process and not aggravated by the compensable injury.

Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). This tribunal will not upset the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The findings and conclusion challenged by the carrier are sufficiently supported by the evidence.

We now address the claimant's argument that the hearing officer failed to add to the disputed issue the claimant's lumbar radiculopathy as one of the lumbar spine conditions aggravated by his fall. More than once in the record, the hearing officer agrees that he will include the matter of lumbar radiculopathy in the issue; however, he does not include it in his decision and order. The hearing officer erred in not including radiculopathy in the disputed issue because both he and the parties agreed that radiculopathy would be added, and because evidence, both testimonial and medical, was presented regarding the claimant's lumbar radiculopathy having been aggravated by his fall.

We affirm the hearing officer's decision and order with respect to his determination that the claimant's spinal stenosis was aggravated by the compensable injury of _____. We remand the case for the hearing officer to make the appropriate findings of fact and conclusions of law regarding the claimed lumbar radiculopathy.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings,

pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge